16A Am. Jur. 2d Constitutional Law § 200

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Constitutional Law
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

a. Rule of Severability; in General

§ 200. Application of rule of severability for partially unconstitutional statutes; tests for severability—Application of rule in specific situations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1046

West's Key Number Digest, Statutes 1533 to 1538

In many specific factual situations, the courts have concluded that one unconstitutional part of a statute could be severed from the constitutional remainder of the statute so that the latter could be saved and enforced. These examples include statutes dealing with—

— child abuse and neglect.[1]
— filing requirements for challenging taxes imposed in excess of constitutional limitations on property taxes.[2]
— highway funding.[3]
— income tax deductions for those making political contributions.[4]
— income tax exemptions.[5]
— insurance rate increases.[6]

— payment of a telecommunications fee for each commercial and residential unit to be served by connection to a city's broadband telecommunications system.[7]
— payroll deductions for state employee association dues.[8]
— prior restraints on disclosing trade secrets.[9]
— prohibiting a court from enjoining the taking and using of property appropriated by the government after the compensation for the property has been deposited with the court, but prior to appellate review of the taking.[10]
— public service penalties for driving while under the influence of alcohol.[11]
— removal of elected trustees of a state university.[12]
— removal of government officers of a public board.[13]
— restrictions on the exportation of timber harvested from public lands.[14]
— restrictions on the governor's authority to grant commutations and reprieves.[15]
— retention of workers' compensation fund judges.[16]
— tort actions against local government units.[17]

In numerous other specific factual situations, the courts have found that one part of a statute was not severable from the remainder of the statute, and therefore the entire statute must fail. These examples include statutes dealing with—

— abortion licensing requirements.[18]
— campaign financing.[19]
— election of circuit court judges.[20]
— election statutes.[21]
— family farm rehabilitation and preservation.[22]
— forest fire suppression taxes.[23]
— general obligation bonds to fund cultural projects.[24]
— highway speed limits.[25]
— inclusion of cost estimates for increasing prison inmate population.[26]
— land sales.[27]
— premises liability.[28]
— strikebreakers act not limited to situations where violence occurs.[29]
— mandated health care insurance.[30]

Footnotes

1 Collins v. Woodham, 257 Ga. 643, 362 S.E.2d 61 (1987).

2 Tilbury v. Multnomah County, 322 Or. 112, 902 P.2d 577 (1995).

3 Sonneman v. Hickel, 836 P.2d 936 (Alaska 1992).

4 Ethics Com'n of State of Okl. v. Cullison, 1993 OK 37, 850 P.2d 1069 (Okla. 1993).

5 Williams v. Zobel, 619 P.2d 422 (Alaska 1980).

[6] Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 258 Cal. Rptr. 161, 771 P.2d 1247 (1989).

[7] Home Builders Assn. of Dayton & Miami Valley v. Lebanon, 167 Ohio App. 3d 247, 2006-Ohio-595, 854 N.E.2d 1097 (12th Dist. Warren County 2006).

[8] Brown v. Alexander, 718 F.2d 1417 (6th Cir. 1983).

[9] State ex rel. Sports Management News v. Nachtigal, 324 Or. 80, 921 P.2d 1304 (1996).

[10] Norwood v. Horney, 110 Ohio St. 3d 353, 2006-Ohio-3799, 853 N.E.2d 1115 (2006).

[11] Drummond v. State, 320 Ark. 385, 897 S.W.2d 553 (1995).

[12] Tully v. Edgar, 171 Ill. 2d 297, 215 Ill. Dec. 646, 664 N.E.2d 43, 109 Ed. Law Rep. 315 (1996).

[13] Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010).

[14] Board of Natural Resources of State of Wash. v. Brown, 992 F.2d 937 (9th Cir. 1993).

[15] State ex rel. Maurer v. Sheward, 71 Ohio St. 3d 513, 1994-Ohio-496, 644 N.E.2d 369 (1994).

[16] Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991).

[17] Clark v. Miller, 503 N.W.2d 422 (Iowa 1993).

[18] Ragsdale v. Turnock, 841 F.2d 1358 (7th Cir. 1988).

[19] Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994).

[20] People ex rel. Chicago Bar Ass'n v. State Bd. of Elections, 136 Ill. 2d 513, 146 Ill. Dec. 126, 558 N.E.2d 89 (1990).

[21] Shrink Missouri Government PAC v. Maupin, 71 F.3d 1422 (8th Cir. 1995).

[22] Federal Land Bank of Wichita v. Bott, 240 Kan. 624, 732 P.2d 710 (1987).

[23] Eastler v. State Tax Assessor, 499 A.2d 921 (Me. 1985).

[24] Brewery Arts Center v. State Bd. of Examiners, 108 Nev. 1050, 843 P.2d 369 (1992).

[25] Lee v. State, 195 Mont. 1, 635 P.2d 1282 (1981).

[26] State ex rel. Stenberg v. Moore, 249 Neb. 589, 544 N.W.2d 344 (1996).

[27] Old Coach Development Corp., Inc. v. Tanzman, 881 F.2d 1227 (3d Cir. 1989).

[28] Gallegos v. Phipps, 779 P.2d 856 (Colo. 1989).

[29] Chamber of Commerce of U. S. v. State, 89 N.J. 131, 445 A.2d 353 (1982).

[30] Florida ex rel. Bondi v. U.S. Dept. of Health and Human Services, 780 F. Supp. 2d 1307 (N.D. Fla. 2011).

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

a. Rule of Severability; in General

§ 201. Partial invalidity of single section, subdivision, or amendment under rule of severability for partially unconstitutional statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1046

West's Key Number Digest, Statutes 1533

The constitutional and unconstitutional provisions of a statute may be included in one and the same section and yet be separable so that some stand while others fall.[1] The test is not whether they are contained in the same section, since the division of a statute into sections is frequently artificial, but whether the valid and the invalid provisions are inseparably connected in substance,[2] and whether, after eliminating the invalid parts, enough remains to carry out the legislative intent.[3]

The rule that the invalidity of a part of a statute does not extend to the whole statute, unless the parts are interdependent is especially applicable to amendments and amendatory acts. Usually, when an amendatory exception to a statute proves unconstitutional, the original statute stands wholly unaffected by it.[4]

Footnotes

[1] Berea College v. Commonwealth of Kentucky, 211 U.S. 45, 29 S. Ct. 33, 53 L. Ed. 81 (1908); Newton v. City of Tuscaloosa, 251 Ala. 209, 36 So. 2d 487 (1948); City of Miami v. Kayfetz, 92 So. 2d 798 (Fla. 1957); People ex rel. Barrett v. Union Bank & Trust Co., 362 Ill. 164, 199 N.E. 272, 104 A.L.R. 1090 (1935); Airey v. Tugwell, 197 La. 982, 3 So. 2d 99 (1941).

[2] State v. McCallion, 78 Ohio App. 3d 709, 605 N.E.2d 1289 (11th Dist. Ashtabula County 1992); State v. Heston, 137 W. Va. 375, 71 S.E.2d 481 (1952).

[3] City of Buffalo v. Till, 192 A.D. 99, 182 N.Y.S. 418 (4th Dep't 1920); Crawford v. State, 116 Ohio St. 312, 5 Ohio L. Abs. 201, 156 N.E. 191 (1927); Bishop v. City of Tulsa, 21 Okla. Crim. 457, 209 P. 228, 27 A.L.R. 1008 (1922).

[4] Frost v. Corporation Commission, 278 U.S. 515, 49 S. Ct. 235, 73 L. Ed. 483 (1929); San Ann Tobacco Co. v. Hamm, 283 Ala. 397, 217 So. 2d 803 (1968); Miller v. Union Bank & Trust Co., 7 Cal. 2d 31, 59 P.2d 1024 (1936); Henderson v. Antonacci, 62 So. 2d 5 (Fla. 1952); State v. Books, 225 N.W.2d 322 (Iowa 1975); City of New Orleans v. Levy, 223 La. 14, 64 So. 2d 798 (1953); State ex rel. Thornton v. Wannamaker, 248 S.C. 421, 150 S.E.2d 607 (1966); State v. Reed, 75 S.D. 300, 63 N.W.2d 803 (1954).

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

a. Rule of Severability; in General

§ 202. Invalidity of substantive portion of statute containing repealing provision under rule of severability for partially unconstitutional statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1046

West's Key Number Digest, Statutes 1533

In cases in which statutes containing repealing clauses have been held to be unconstitutional, the general rule is that the clause containing the repeal is incidental to the rest of the statute, and that if the rest of the statute is invalid, the clause containing the repeal will likewise be deemed invalid, leaving the prior general law unrepealed.[1] It must be pointed out, however, that the question in every case is whether the legislature intended that the repeal should take effect in any event—that is, whether the repeal provision is severable.[2] The courts sometimes state that the clause of specific repeal in a substitute statute will fall with the act of which it is a part, unless it is clear that the legislature would have adopted the clause of repeal without providing the new legislation.[3]

Footnotes

[1] Selective Life Ins. Co. v. Equitable Life Assur. Soc. of U. S., 101 Ariz. 594, 422 P.2d 710 (1967); Crater v. Somerset County, 123 N.J.L. 407, 8 A.2d 691 (N.J. Ct. Err. & App. 1939); Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington, 237 N.C. 179, 74 S.E.2d 749 (1953); Board of Elections for Franklin County v. State ex rel. Schneider, 128 Ohio St. 273, 191 N.E. 115, 97 A.L.R. 1417 (1934); Mazurek v. Farmers' Mut. Fire Ins. Co. of Jamestown, 320 Pa. 33, 181 A. 570, 102 A.L.R. 798 (1935).

[2] People v. Fox, 294 Ill. 263, 128 N.E. 505 (1920); Ward v. Commonwealth, 228 Ky. 468, 15 S.W.2d 276 (1929); Mazurek v. Farmers' Mut. Fire Ins. Co. of Jamestown, 320 Pa. 33, 181 A. 570, 102 A.L.R. 798 (1935); North Bend Stage Line v. Department of Public Works, 170 Wash. 217, 16 P.2d 206 (1932).

[3] Vennekolt v. Lutey, 96 Mont. 72, 28 P.2d 452 (1934); Mazurek v. Farmers' Mut. Fire Ins. Co. of Jamestown, 320 Pa. 33, 181 A. 570, 102 A.L.R. 798 (1935).

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

b. Basis of Rule of Severability; Legislative Intent

§ 203. Legislative intent under rule of severability for partially unconstitutional statutes, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1046

West's Key Number Digest, Statutes 1533, 1534

The question whether portions of a statute that are constitutional should be upheld while other portions are eliminated as unconstitutional primarily involves ascertaining the intent of the legislature.[1] In determining whether one portion of a statute or constitutional provision is severable from another, the touchstone must always be legislative intent.[2] In determining the severability of a statute, the court examines the challenged statute as a whole to determine whether the legislature could have intended to enact the valid sections alone and whether those valid sections alone work to achieve the legislature's goals.[3] Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability.[4]

If the objectionable parts of a statute are severable from the rest in such a way that the legislature would be presumed to have enacted the valid portion without the invalid, the failure of the latter will not

necessarily render the entire statute invalid, but instead the statute may be enforced as to those portions of it that are constitutional.[5] Even when material provisions in a statute as enacted must be eliminated because of their invalidity, the remaining valid provisions of it are not rendered ineffective if the part upheld constitutes, independently of the invalid portion, a complete law in some reasonable aspect, unless it appears from the act itself that the legislature intended it to be effective only as an entirety and would not have enacted the valid part alone.[6] In other words, in determining whether constitutionally deficient portions of a statute can be severed, a court must decide whether the unconstitutional portions of the statute are so interrelated and connected with the constitutional parts that they cannot be separated without destroying the intention manifested by the legislature in passing the act.[7] When part of a statute is held unconstitutional, as far as possible, the court will hold the remainder to be constitutional and valid, if the parts are capable of separation and are not so entwined that the legislature could not have intended that the part otherwise valid should take effect without the invalid part.[8]

If, however, the constitutional and the unconstitutional portions are so dependent on each other as to warrant the belief that the legislature intended them to take effect in their entirety, it follows that if the whole cannot be carried into effect, it will be presumed that the legislature would not have passed the remainder independently, and accordingly the entire statute is invalid.[9] In other words, to determine the appropriate remedy for a constitutional flaw in a statute, a court, after finding that an application or a portion of a statute is unconstitutional, must next inquire whether the legislature would have preferred what is left of the statute to no statute at all.[10] Where a statute, regulation, or state action faces a constitutional challenge, a court may preserve its valid portions if the offending language can lawfully be severed; but where it is evident that the remaining provisions would not have been enacted without the unconstitutional provision, a court should invalidate the entire provision.[11]

Footnotes

1 Electric Bond & Share Co. v. Securities and Exchange Commission, 303 U.S. 419, 58 S. Ct. 678, 82 L. Ed. 936, 115 A.L.R. 105 (1938); Soto-Lopez v. New York City Civil Service Com'n, 755 F.2d 266 (2d Cir. 1985), judgment aff'd, 476 U.S. 898, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986); Coe v. Reynolds, 529 F. Supp. 488 (D.N.H. 1982); Sonneman v. Hickel, 836 P.2d 936 (Alaska 1992); Amsel v. Brooks, 141 Conn. 288, 106 A.2d 152, 45 A.L.R.2d 1234 (1954); Louisiana Associated General Contractors, Inc. v. State Through Div. of Admin., Office of State Purchasing, 669 So. 2d 1185 (La. 1996); Whitaker v. City of Springfield, 889 S.W.2d 869 (Mo. Ct. App. S.D. 1994); City of Springfield v. Kenney, 62 Ohio L. Abs. 123, 104 N.E.2d 65 (Ct. App. 2d Dist. Clark County 1951); State v. Heston, 137 W. Va. 375, 71 S.E.2d 481 (1952).

2 Adams v. Governor of Delaware, 922 F.3d 166 (3d Cir. 2019), cert. granted, 140 S. Ct. 602, 205 L. Ed. 2d 380 (2019).

3 Association of Washington Business v. Washington State Department of Ecology, 455 P.3d 1126 (Wash. 2020).

[4] United States v. Smith, 945 F.3d 729 (2d Cir. 2019).
Under New York law, there is a presumption that lawmakers would prefer the portion remaining after partial invalidation to continue in effect; moreover, the presumption is reinforced by the presence of a broad severability clause. Association of Home Appliance Manufacturers v. City of New York, 36 F. Supp. 3d 366 (S.D. N.Y. 2014).
As to expressed intent and savings or severability clauses, see § 203.

[5] Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932); Soto-Lopez v. New York City Civil Service Com'n, 755 F.2d 266 (2d Cir. 1985), judgment aff'd, 476 U.S. 898, 106 S. Ct. 2317, 90 L. Ed. 2d 899 (1986); Sonneman v. Hickel, 836 P.2d 936 (Alaska 1992); Teeval Co. v. Stern, 301 N.Y. 346, 93 N.E.2d 884 (1950); Johnson v. State Election Bd., 1946 OK 119, 197 Okla. 211, 167 P.2d 891 (1946); Swedish Hosp. of Seattle v. Department of Labor and Industries, 26 Wash. 2d 819, 176 P.2d 429 (1947).

[6] Murphy v. Commissioner of Dept. of Indus. Accidents, 418 Mass. 165, 635 N.E.2d 1180 (1994); City of Roanoke Rapids v. Peedin, 124 N.C. App. 578, 478 S.E.2d 528 (1996).

[7] State v. Powdrill, 684 So. 2d 350 (La. 1996).

[8] Com. v. Cole, 468 Mass. 294, 10 N.E.3d 1081 (2014).

[9] McDowell v. U.S., 274 F. Supp. 426 (E.D. Tenn. 1967); Board of Osteopathic Examiners v. Board of Medical Examiners, 53 Cal. App. 3d 78, 125 Cal. Rptr. 619 (3d Dist. 1975); Harris v. Bryan, 89 So. 2d 601 (Fla. 1956); Fidelity & Cas. Co. of New York v. Whitehead, 114 Ga. App. 630, 152 S.E.2d 706 (1966); Preisler v. Calcaterra, 362 Mo. 662, 243 S.W.2d 62 (1951); Leonard v. City of Spokane, 127 Wash. 2d 194, 897 P.2d 358 (1995).

[10] Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006).
In determining the severability of a statute under Massachusetts law, the court must seek to ascertain whether the legislature would have enacted the particular bill without the invalid provision, or whether, in the absence of the invalid provision, the legislature would have preferred that the bill have no effect at all. Schwann v. FedEx Ground Package System, Inc., 813 F.3d 429 (1st Cir. 2016).

[11] Doe v. Wilmington Housing Authority, 88 A.3d 654 (Del. 2014).

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

b. Basis of Rule of Severability; Legislative Intent

§ 204. Expressed legislative intent under rule of severability for partially unconstitutional statutes; savings or severability clauses

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1046

West's Key Number Digest, Statutes 1533, 1534

Occasionally, the legislature expressly states its will that the valid provisions of a statute be enforced in spite of any judicial determination that certain sections of the act are unconstitutional. Such an expression of the will of the legislature is entitled to great weight[1] and generally should be carried out by the courts.[2] Severability clauses express the enacting legislature's preference for a judicial remedy, and courts will generally attempt to honor that preference.[3] More specifically, where a part of a statutory code contains a savings clause explicitly stating that the legislature would have passed every aspect of the code part irrespective of the unconstitutionality of any other aspect, this clause should be given effect where the statutory provisions at issue are not sufficiently interrelated or interdependent to allow the clause to be disregarded, and where it is clear that the legislature did not prefer doing without the entire statute if part of the statute was found unconstitutional.[4]

The effect of a savings clause is to reverse the common-law presumption that the legislature intends an act to be effective as a whole.[5] Thus, the inclusion of an express severability clause in a federal statute creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision; in such a case, unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute.[6] The consequence of this presumption of severability is that the burden is upon the assailant of the statute to show the inseparability of the statutory provisions.[7]

The saving clause is not absolute for the reason that it is merely an aid to interpretation and not an inexorable command;[8] it is rebuttable, although in order to defeat the entire act this presumption must be overcome by considerations that make evident the inseparability of the provisions or the clear probability that, the invalid part being eliminated, the legislature would not have been satisfied with what remained.[9] When the presumption of separability is overcome by a showing of the indivisible character of the act in spite of the provision, the entire act must fall with any invalid portion.[10]

Observation:

A severability clause in a statute is not grounds for a court to devise a judicial remedy that entails quintessentially legislative work.[11]

Footnotes

1 Moreau v. Lewis, 648 So. 2d 124 (Fla. 1995) (expressed preference is persuasive); City of Seattle v. State, 103 Wash. 2d 663, 694 P.2d 641 (1985).

2 Robertson v. Seattle Audubon Soc., 503 U.S. 429, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992); McElroy v. U.S. ex rel. Guagliardo, 361 U.S. 281, 80 S. Ct. 305, 4 L. Ed. 2d 282 (1960); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946); Lee Enterprises, Inc. v. Iowa State Tax Commission, 162 N.W.2d 730 (Iowa 1968); In re Extension of Boundaries of City of Brookhaven, 217 Miss. 860, 65 So. 2d 832 (1953); Southwestern Bell Tel. Co. v. Morris, 345 S.W.2d 62, 85 A.L.R.2d 1033 (Mo. 1961); City of Springfield v. Kenney, 62 Ohio L. Abs. 123, 104 N.E.2d 65 (Ct. App. 2d Dist. Clark County 1951); Jordan v. Crudgington, 149 Tex. 237, 231 S.W.2d 641 (1950); State v. Heston, 137 W. Va. 375, 71 S.E.2d 481 (1952).

3 Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 195 L. Ed. 2d 665, 100 Fed. R. Evid. Serv. 887 (2016), as revised, (June 27, 2016).

[4] Leavitt v. Jane L., 518 U.S. 137, 116 S. Ct. 2068, 135 L. Ed. 2d 443 (1996).

[5] Electric Bond & Share Co. v. Securities and Exchange Commission, 303 U.S. 419, 58 S. Ct. 678, 82 L. Ed. 936, 115 A.L.R. 105 (1938); Coe v. Reynolds, 529 F. Supp. 488 (D.N.H. 1982); Tooz v. State, 76 N.D. 599, 38 N.W.2d 285 (1949).

[6] Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987); Yount v. Salazar, 933 F. Supp. 2d 1215 (D. Ariz. 2013), aff'd, 877 F.3d 845 (9th Cir. 2017), cert. denied, 139 S. Ct. 57, 202 L. Ed. 2d 19 (2018) and cert. denied, 139 S. Ct. 309, 202 L. Ed. 2d 19 (2018); Perrong v. Liberty Power Corp., L.L.C., 411 F. Supp. 3d 258 (D. Del. 2019).

[7] Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

[8] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 195 L. Ed. 2d 665, 100 Fed. R. Evid. Serv. 887 (2016), as revised, (June 27, 2016); Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932); State ex rel. English v. Industrial Commission, 160 Ohio St. 215, 52 Ohio Op. 27, 115 N.E.2d 395 (1953), opinion adhered to on reh'g, 160 Ohio St. 443, 52 Ohio Op. 335, 117 N.E.2d 22 (1954); State ex rel. Pennock v. Coe, 42 Wash. 2d 569, 257 P.2d 190 (1953).

[9] Leavitt v. Jane L., 518 U.S. 137, 116 S. Ct. 2068, 135 L. Ed. 2d 443 (1996); Cottrell v. Faubus, 233 Ark. 721, 347 S.W.2d 52 (1961); State ex rel. Johnson v. Consumers Public Power Dist., 143 Neb. 753, 10 N.W.2d 784, 152 A.L.R. 480 (1943); Carrollton-Farmers Branch Independent School Dist. v. Edgewood Independent School Dist., 826 S.W.2d 489, 73 Ed. Law Rep. 1190 (Tex. 1992).

[10] Leavitt v. Jane L., 518 U.S. 137, 116 S. Ct. 2068, 135 L. Ed. 2d 443 (1996); City of Tucson v. Stewart, 45 Ariz. 36, 40 P.2d 72, 96 A.L.R. 1492 (1935); American Federation of Labor v. Reilly, 113 Colo. 90, 155 P.2d 145, 160 A.L.R. 873 (1944); Carrollton-Farmers Branch Independent School Dist. v. Edgewood Independent School Dist., 826 S.W.2d 489, 73 Ed. Law Rep. 1190 (Tex. 1992).

[11] Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 195 L. Ed. 2d 665, 100 Fed. R. Evid. Serv. 887 (2016), as revised, (June 27, 2016).
The doctrine of separation of governmental powers prevents a court from rewriting a legislative enactment through the creative use of a severability clause when the result is incompatible with the language of the statute. People v. Marquan M., 24 N.Y.3d 1, 994 N.Y.S.2d 554, 19 N.E.3d 480, 310 Ed. Law Rep. 1079 (2014).

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

b. Basis of Rule of Severability; Legislative Intent

§ 205. Implied legislative intent under rule of severability for partially unconstitutional statutes; effect of absence of saving clause

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1046

West's Key Number Digest, Statutes 1533, 1534

The common-law rule is that absent a legislative declaration that the invalidity of a portion of a statute will not affect the remainder, the presumption is that the legislature intended the act to be effective as an entirety or not at all.[1] This presumption places upon the supporter of the statute the burden of showing the separability of the provisions.[2] Although the presumption is not conclusive.[3] The Supreme Court has held, however, that in the absence of a severability clause, Congress's silence is just that—silence—and does not raise a presumption against severability.[4] Thus, the absence of a severability clause cuts neither against nor in favor of severance, and the presumption of severability remains intact.[5]

Under either approach, severability ultimately depends on the intent of the legislature,[6] and the ultimate determination of severability will rarely turn on the presence or absence of a severability clause.[7] Thus,

absent a savings clause, the test of severability is whether the legislature would have eliminated the offending portion of the act, if advised of the infirmity, and would have enacted the measure absent the offending portion.[8] In determining the severability of an unconstitutional subsection of a statute, the Court looks to legislative intent, and when no express legislative intent is present within the statute, the Court turns to the statute itself, and examines the remaining constitutional portion of the statute in relation to the stricken portion.[9]

Footnotes

1 Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936); Coe v. Reynolds, 529 F. Supp. 488 (D.N.H. 1982); Ratcliff v. Buncombe County, N.C., 663 F. Supp. 1003 (W.D. N.C. 1987); South Carolina Tax Com'n v. United Oil Marketers, Inc., 306 S.C. 384, 412 S.E.2d 402 (1991).

2 Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

3 Coe v. Reynolds, 529 F. Supp. 488 (D.N.H. 1982).

4 Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 107 S. Ct. 1476, 94 L. Ed. 2d 661 (1987); Hamad v. Gates, 732 F.3d 990 (9th Cir. 2013).

5 Association of American Railroads v. United States Department of Transportation, 896 F.3d 539 (D.C. Cir. 2018), cert. denied, 139 S. Ct. 2665, 204 L. Ed. 2d 1085 (2019).

6 Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936); Coe v. Reynolds, 529 F. Supp. 488 (D.N.H. 1982).
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7 Ameur v. Gates, 759 F.3d 317 (4th Cir. 2014).

8 Joe Flynn Rare Coins Inc. v. Stephan, 526 F. Supp. 1275 (D. Kan. 1981).

9 In re Gestational Agreement, 2019 UT 40, 449 P.3d 69 (Utah 2019).

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

c. Partial Unconstitutionality in Particular Respects

§ 206. Invalidity of inducing provision under rule of severability for partially unconstitutional statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1046

West's Key Number Digest, Statutes 1533

It is a well-established rule regarding the severability of partially unconstitutional statutes that if the valid and the invalid parts of a statute are so bound together that the invalid part is a material inducement to the valid portion, the whole is invalid.[1] In other words, if it appears that the invalid portion was designed as an inducement to pass the valid, the inference is that the legislature would not have passed the valid portion alone.[2]

On the other hand, where the invalid portion of an act or statute was not an inducement for passage of the entire act or statute, the unconstitutional portion may normally be severed from the remainder, and the valid portions may be enforced independently.[3] If a statute does not contain a severability clause, courts still may sever an unconstitutional provision; in doing so, courts must determine whether the unconstitutional provisions are necessary for the integrity of the law or were an inducement for its enactment.[4]

Footnotes

[1] Bynum v. City of Oneonta, 175 So. 3d 63 (Ala. 2015); Skyline Materials, Inc. v. City of Belmont, 198 Cal. App. 2d 449, 18 Cal. Rptr. 95 (1st Dist. 1961); Duggan v. Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996); Fullerton v. Lamm, 177 Or. 655, 165 P.2d 63 (1946).

[2] City and County of Denver v. Lynch, 92 Colo. 102, 18 P.2d 907, 86 A.L.R. 907 (1932); Duggan v. Beermann, 249 Neb. 411, 544 N.W.2d 68 (1996).

[3] Campana v. Arizona State Land Dept., 176 Ariz. 288, 860 P.2d 1341 (Ct. App. Div. 1 1993); Robotham v. State, 241 Neb. 379, 488 N.W.2d 533 (1992).

[4] State v. Theeler, 2016 MT 318, 385 Mont. 471, 385 P.3d 551 (2016).

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

c. Partial Unconstitutionality in Particular Respects

§ 207. Invalidity of essential provision under rule of severability for partially unconstitutional statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1046

West's Key Number Digest, Statutes 1533

One of the tests used to determine the intention of the legislature as to severability of a statute is whether the invalid portion is so important to the general plan and operation of the law in its entirety as reasonably to lead one to the conclusion that it would not have been adopted if the legislature had perceived the invalidity of the part held to be unconstitutional.[1] Whenever the ruling feature of a law or an essential part from which the remaining portions take their cast is unconstitutional, the act must fall as a whole; it cannot be presumed that the legislature would have enacted the statute without that part.[2] Thus, where an essential element of a statute is declared unconstitutional, the entire statute must be rejected.[3] If the portions of a statute rejected as in themselves unconstitutional are not merely incidental and subordinate so that they could be stricken out without impairing the efficiency of the act, their invalidity will render the entire law void.[4]

Footnotes

[1] Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932); Bynum v. City of Oneonta, 175 So. 3d 63 (Ala. 2015); City and County of Denver v. Lynch, 92 Colo. 102, 18 P.2d 907, 86 A.L.R. 907 (1932); State ex rel. Taylor v. Hall, 129 Neb. 669, 262 N.W. 835 (1935); Becker County Sand & Gravel Co. v. Wosick, 62 N.D. 740, 245 N.W. 454 (1932); State ex rel. Allen v. Ferguson, 155 Ohio St. 26, 44 Ohio Op. 63, 97 N.E.2d 660 (1951); White v. Maverick County Water Control and Imp. Dist. No. 1, 35 S.W.2d 107 (Tex. Comm'n App. 1931).

[2] City and County of Denver v. Lynch, 92 Colo. 102, 18 P.2d 907, 86 A.L.R. 907 (1932); State ex rel. Chess & Wymond Co. of Louisiana v. Grace, 188 La. 129, 175 So. 825 (1937); Smithberger v. Banning, 129 Neb. 651, 262 N.W. 492, 100 A.L.R. 686 (1935); New York Edison Co. v. City of New York, 282 N.Y.S. 936 (Sup 1935), aff'd, 246 A.D. 511, 282 N.Y.S. 943 (1st Dep't 1935); Hannabass v. Maryland Cas. Co., 169 Va. 559, 194 S.E. 808 (1938); McFarland v. City of Cheyenne, 48 Wyo. 86, 42 P.2d 413 (1935).

[3] Ex parte E.R.G., 73 So. 3d 634, 86 A.L.R.6th 651 (Ala. 2011).

[4] National Ice & Cold Storage Co. of California v. Pacific Fruit Express Co., 11 Cal. 2d 283, 79 P.2d 380 (1938); Ricks v. Close, 201 La. 242, 9 So. 2d 534 (1942).

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

c. Partial Unconstitutionality in Particular Respects

§ 208. Invalidity of nonessential provision under rule of severability for partially unconstitutional statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1046

West's Key Number Digest, Statutes 1533

It is almost invariably held that the invalidity of particular provisions of a statute will not require invalidation of the whole statute where the invalid provisions are nonessential—that is, where they may be eliminated and the remainder given effect without interfering with the just and proper working out of the general purposes of the act.[1] Obviously, to be capable of separate enforcement, the valid portion must be independent of the invalid and must form a complete act within itself.[2]

Stated differently, the principle is that where the part of an act that is unconstitutional does not enter into the life of the act itself, was not an inducement to its passage, and is not essential to its being, it may be disregarded and the rest remain in force.[3]

Footnotes

[1] State ex rel. Stenberg v. Murphy, 247 Neb. 358, 527 N.W.2d 185 (1995).

[2] Millett v. Frohmiller, 66 Ariz. 339, 188 P.2d 457 (1948).

[3] Legends Bank v. State, 361 S.W.3d 383 (Mo. 2012); State ex rel. Stenberg v. Moore, 249 Neb. 589, 544 N.W.2d 344 (1996).

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2. Partial Unconstitutionality

c. Partial Unconstitutionality in Particular Respects

§ 209. Invalidity of exception or proviso under rule of severability for partially unconstitutional statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1046

West's Key Number Digest, Statutes 1533

One important class of cases in which questions as to the severability of valid and invalid portions of an act and the determination of the legislative intent are involved consists of statutes containing invalid exceptions or provisos. The general rule is that if such a proviso operates to limit the scope of the act in such a manner that by striking out the proviso the remainder of the statute would have a broader scope either as to subject or territory, then the whole act is invalid because such extended operation would not be in accordance with the legislative intent.[1] In some of these cases, the exception of a particular group from the provisions of a general statute may have been a material consideration with the legislature in the passage of the act, and the courts may properly infer that it would not have been enacted if that group had not been excluded from its operation and protected from its provisions.[2]

The rule is equally well settled that exceptions may be stricken out when doing so does not defeat the

general intent of the legislature.[3]

Footnotes

[1] Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994); Reynolds v. State, 181 Ga. 547, 182 S.E. 917 (1935); Ettinger v. Studevent, 219 Ind. 406, 38 N.E.2d 1000 (1942); Preisler v. Calcaterra, 362 Mo. 662, 243 S.W.2d 62 (1951); Allied Stores of Ohio, Inc. v. Bowers, 166 Ohio St. 116, 1 Ohio Op. 2d 342, 140 N.E.2d 411 (1957), judgment aff'd, 358 U.S. 522, 79 S. Ct. 437, 3 L. Ed. 2d 480, 82 Ohio L. Abs. 312 (1959); State v. Wofford, 34 S.W.3d 671 (Tex. App. Austin 2000); Guard v. Jackson, 83 Wash. App. 325, 921 P.2d 544 (Div. 1 1996), aff'd, 132 Wash. 2d 660, 940 P.2d 642 (1997).

[2] Gramling v. Maxwell, 52 F.2d 256 (W.D. N.C. 1931); State ex rel. English v. Industrial Commission, 160 Ohio St. 215, 52 Ohio Op. 27, 115 N.E.2d 395 (1953), opinion adhered to on reh'g, 160 Ohio St. 443, 52 Ohio Op. 335, 117 N.E.2d 22 (1954).

[3] State v. Goza, 4 Kan. App. 2d 309, 605 P.2d 594 (1980); State v. Burning Tree Club, Inc., 315 Md. 254, 554 A.2d 366 (1989); Southwestern Bell Tel. Co. v. Morris, 345 S.W.2d 62, 85 A.L.R.2d 1033 (Mo. 1961); Lynden Transport, Inc. v. State, 112 Wash. 2d 115, 768 P.2d 475, 52 Ed. Law Rep. 298, 84 A.L.R.4th 405 (1989).

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V. Determination of Constitutionality of Legislation

D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

c. Partial Unconstitutionality in Particular Respects

§ 210. Insufficient or invalid title under rule of severability for partially unconstitutional statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1046

West's Key Number Digest, Statutes 1533, 1536

In accordance with the general principles governing the severability of statutes,[1] where the title of an act is invalid because of a single-subject-and-title requirement[2] or is otherwise insufficient, the rule is that the matters in the body of the statute not embraced are invalid, but the remainder of the act is not unconstitutional, unless the parts are inextricably interwoven in the texture of the statute.[3] In some jurisdictions, a court may determine which subject is primary and which is an unrelated addition, and then sever the unrelated provisions and preserve the portions of the bill relating to a single subject,[4] whereas in others it not an appropriate remedy for a court to choose which provisions should remain valid and enforceable.[5] When a court can discern no primary subject matter of a legislative bill, severance is not possible and the bill must be held unconstitutional in its entirety pursuant to the one-subject rule.[6]

As illustrative of statutes held to be partially valid despite insufficiency of the title are decisions

involving—
— a stop-and-frisk statute.[7]
— a statute relating to the eligibility of a mayor to succeed himself for one term.[8]
— the Uniform Narcotics Drug Law.[9]
— a shoplifting statute.[10]
— a statute establishing community improvement districts.[11]
— a statute increasing the amount of excise tax imposed on the sale of certain intoxicating liquors.[12]

Footnotes

1 As to these principles, generally, see §§ 198, 199.

2 James v. State, 541 N.W.2d 864 (Iowa 1995).

3 Swedish Hosp. of Seattle v. Department of Labor and Industries, 26 Wash. 2d 819, 176 P.2d 429 (1947).

4 In re Avon Skilled Nursing and Rehabilitation, 2019-Ohio-3790, 133 N.E.3d 561 (Ohio Ct. App. 10th Dist. Franklin County 2019), appeal not allowed, 2020-Ohio-877, 2020 WL 1264060 (Ohio 2020).

5 Sernovitz v. Dershaw, 633 Pa. 641, 127 A.3d 783 (2015).

6 City of Toledo v. State, 2018-Ohio-4534, 123 N.E.3d 343 (Ohio Ct. App. 6th Dist. Lucas County 2018), appeal not allowed, 155 Ohio St. 3d 1404, 2019-Ohio-943, 119 N.E.3d 432 (2019).

7 White v. State, 49 Ala. App. 5, 267 So. 2d 802 (Crim. App. 1972).

8 Griffith v. Merritt, 223 Ga. 562, 157 S.E.2d 23 (1967).

9 State v. Welkner, 259 La. 815, 253 So. 2d 192 (1971).

10 Clark's Brooklyn Park, Inc. v. Hranicka, 246 Md. 178, 227 A.2d 726 (1967).

11 Cooperative Home Care, Inc. v. City of St. Louis, 514 S.W.3d 571 (Mo. 2017).

12 State ex rel. Distilled Spirits Institute, Inc. v. Kinnear, 80 Wash. 2d 175, 492 P.2d 1012 (1972).

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D. Effect of Total or Partial Unconstitutionality of Statutes

2. Partial Unconstitutionality

c. Partial Unconstitutionality in Particular Respects

§ 211. Invalidity of part of subject matter under rule of severability for partially unconstitutional statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1046

West's Key Number Digest, Statutes 1533 to 1538

Statutes may be unconstitutional and void as to their application to a part of their subject matter and valid as to other parts,[1] or, to state the problem more concretely, they may be constitutional in operation with respect to some persons and states of fact and unconstitutional as to others.[2] If a statute is reasonably appropriate in its overall approach, it should be upheld, notwithstanding that it may be unconstitutional in special circumstances, especially when it is apparent that the legislature would want the act to prevail where constitutionally it may.[3] Thus, if a statute is unconstitutional as applied, the state may continue to enforce that statute in different circumstances where it is not unconstitutional,[4] and if a statute has unconstitutional applications, they are severable from the constitutional applications.[5]

One class of cases in which a statute may be in part valid and in part invalid consists of laws enacted by a legislature in general terms, covering not only persons and property as to which the legislature clearly

has the right to make laws but apparently applying also to individuals and property protected from such legislation.[6] A law may be unconstitutional and void in relation to particular cases and yet valid to all intents and purposes in its application to other cases that differ from the former in material characteristics.[7] In other words, where a statute has been passed by the legislature and, in relation to certain cases that it affects, some part of it is not within the competency of the legislative power or is repugnant to some provision of the constitution, that part may be adjudged void and of no avail, while all other parts of the act not obnoxious to the same objection may be upheld as valid and have the force of law.[8]

The most common cases in which the field of legislation is restricted by implication are those in which certain individuals are protected from legislative interference by reason of the operation of the constitutional clauses prohibiting the impairment of the obligation of contracts,[9] prohibiting the passage of retrospective laws,[10] and prohibiting encroachments by Congress and the state legislatures respectively on each other's domain.[11] Thus, an act of the legislature may be unconstitutional so far as it purports to operate retrospectively[12] or to have retroactive application to past contracts[13] or to the extent that it is found to impair the obligation of a contract, and yet it may be valid and constitutional in other respects and as applied to future cases.[14]

The general principle has also been applied to the large and important class of cases where state laws are partially invalid as interfering with interstate commerce. Such statutes have frequently been treated as severable and sustained to the extent of regulating commerce within the confines of the state.[15] The reverse is the case where an Act of Congress, while embracing subjects within its authority in regulating commerce, also includes subjects not within its constitutional power. If the two are so interblended in the statute that they are incapable of separation, the entire statute will be held to be repugnant to the Federal Constitution and nonenforceable.[16]

Footnotes

1 Paul v. Allied Dairymen, Inc., 209 Cal. App. 2d 112, 25 Cal. Rptr. 595 (5th Dist. 1962); City of St. Paul v. Dalsin, 245 Minn. 325, 71 N.W.2d 855 (1955); Lee v. Smith, 189 Miss. 636, 198 So. 296 (1940); Commonwealth v. Carolina Coach Co. of Va., 192 Va. 745, 66 S.E.2d 572 (1951); Harbert v. Harrison County Court, 129 W. Va. 54, 39 S.E.2d 177 (1946); McFarland v. City of Cheyenne, 48 Wyo. 86, 42 P.2d 413 (1935).

2 Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006); Application of Spinks, 253 Cal. App. 2d 748, 61 Cal. Rptr. 743 (4th Dist. 1967); Hansen v. Raleigh, 391 Ill. 536, 63 N.E.2d 851, 163 A.L.R. 1425 (1945); Sanitation Dist. No. 1 of Jefferson County v. Campbell, 249 S.W.2d 767 (Ky. 1952); City of St. Paul v. Dalsin, 245 Minn. 325, 71 N.W.2d 855 (1955); Moore v. Grillis, 205 Miss. 865, 39 So. 2d 505, 10 A.L.R.2d 1425 (1949); Borough of Sayreville v. Pennsylvania R. Co., 26 N.J. 197, 139 A.2d 97 (1958); Harbert v. Harrison County Court, 129 W. Va. 54, 39 S.E.2d 177 (1946).

[3] Borough of Sayreville v. Pennsylvania R. Co., 26 N.J. 197, 139 A.2d 97 (1958).

[4] State v. Small, 162 Ohio App. 3d 375, 2005-Ohio-3813, 833 N.E.2d 774 (10th Dist. Franklin County 2005), cause dismissed, 106 Ohio St. 3d 1476, 2005-Ohio-4054, 832 N.E.2d 731 (2005).

[5] Leiendecker v. Asian Women United of Minnesota, 895 N.W.2d 623 (Minn. 2017).

[6] Sault Ste. Marie Hospital v. Sharpe, 209 Mich. 684, 177 N.W. 297 (1920); McFarland v. City of Cheyenne, 48 Wyo. 86, 42 P.2d 413 (1935).

[7] Foundation for the Handicapped v. Department of Social and Health Services of Washington State, 97 Wash. 2d 691, 648 P.2d 884 (1982).

[8] Oglesby v. Pacific Finance Corporation of California, 44 Ariz. 449, 38 P.2d 646 (1934); Sanitation Dist. No. 1 of Jefferson County v. Campbell, 249 S.W.2d 767 (Ky. 1952); Commonwealth v. Carolina Coach Co. of Va., 192 Va. 745, 66 S.E.2d 572 (1951).

[9] §§ 747 to 782.

[10] Purdy v. Erie R. Co., 162 N.Y. 42, 56 N.E. 508 (1900).

[11] Missouri Pac. R. Co. v. Castle, 224 U.S. 541, 32 S. Ct. 606, 56 L. Ed. 875 (1912); State v. Smiley, 65 Kan. 240, 69 P. 199 (1902), aff'd, 196 U.S. 447, 25 S. Ct. 289, 49 L. Ed. 546 (1905).

[12] Purdy v. Erie R. Co., 162 N.Y. 42, 56 N.E. 508 (1900).

[13] Lynch v. U.S., 292 U.S. 571, 54 S. Ct. 840, 78 L. Ed. 1434 (1934).

[14] State ex rel. Cleveringa v. Klein, 63 N.D. 514, 249 N.W. 118, 86 A.L.R. 1523 (1933).

[15] Am. Jur. 2d, Commerce §§ 91 to 93.

[16] Chicago, I. & L.R. Co. v. Hackett, 228 U.S. 559, 33 S. Ct. 581, 57 L. Ed. 966 (1913); Howard v. Illinois Cent. R. Co., 207 U.S. 463, 28 S. Ct. 141, 52 L. Ed. 297 (1908).

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VI. Distribution of Powers of Federal and State Governments

A. Division of Powers

1. Constitutional Powers

§ 212. Basis of division of powers between federal and state governments; dual sovereignty

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 637, 638

West's Key Number Digest, States 4, 4.1(1), 4.4(1), 4.16(1)

By the terms of the Constitution, certain powers are entrusted to the federal government alone while others are reserved to the states, and still, others may be exercised concurrently by both the federal and state governments,[1] and the federal government has no power beyond what has been granted to it through the Constitution.[2] The Constitution established a system of dual sovereignty between the states and the federal government in which the states retain a residuary and inviolable sovereignty.[3] Dual sovereignty is a defining feature of the constitutional blueprint.[4]

Observation:

The constitutional allocation of powers between the National Government and the states enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting

the people, from whom all governmental powers are derived.[5]

In cases involving the division of authority between federal and state governments, if a power is delegated to Congress in the Constitution, the 10th Amendment expressly disclaims any reservation of that power to the states; if a power is an attribute of state sovereignty reserved by the 10th Amendment, it is necessarily a power the Constitution has not conferred on Congress.[6]

The powers which are delegated by the Constitution to the federal government, either by its express terms or by necessary implication,[7] are comprehensive and complete, without limitations other than those found in the Constitution itself.[8]

Footnotes

1 Tafflin v. Levitt, 493 U.S. 455, 110 S. Ct. 792, 107 L. Ed. 2d 887 (1990).

2 U.S. v. Kahn, 304 F. Supp. 2d 1353 (M.D. Fla. 2004).

3 Lombardo v. Pennsylvania, Dept. of Public Welfare, 540 F.3d 190 (3d Cir. 2008).

4 Sossamon v. Texas, 563 U.S. 277, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011).

5 Bond v. U.S., 564 U.S. 211, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011).

6 Islander East Pipeline Co., LLC v. Connecticut Dept. of Environmental Protection, 482 F.3d 79 (2d Cir. 2006).

7 §§ 213, 222, 223.

8 Atlantic Coast Line R. Co. v. Riverside Mills, 219 U.S. 186, 31 S. Ct. 164, 55 L. Ed. 167 (1911); U.S. Nat. Bank of Omaha, Neb. v. Pamp, 77 F.2d 9, 99 A.L.R. 1370 (C.C.A. 8th Cir. 1935).

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16A Am. Jur. 2d Constitutional Law § 213

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Constitutional Law

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VI. Distribution of Powers of Federal and State Governments

A. Division of Powers

1. Constitutional Powers

§ 213. Delegated powers of federal government; determining powers delegated under Constitution

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 637, 638

West's Key Number Digest, States 4, 4.1(1), 4.4(1), 4.16(1)

The United States Constitution contains an enumeration of powers expressly granted by the people to the federal government.[1] Because the federal powers derive from such a grant from the people, it is axiomatic that the United States is a government of limited, enumerated, and delegated powers[2] and that it cannot exercise any authority not granted by the Federal Constitution either in express words or by necessary implication.[3] Thus, a federal court must identify a constitutional predicate for the imposition of any affirmative duty on a state.[4] However, the 10th Amendment does not operate as a limitation upon the powers, express or implied, delegated to the national government.[5] If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the states; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.[6]

Impermissible interference with state sovereignty is not within the enumerated constitutional powers of

the National Government, and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States.[7] Although the Constitution and laws of the United States are the supreme law of the land, and state legislation may not contravene federal law, the federal government does not have a general right to review and veto state enactments before they go into effect.[8]

Whenever a question arises as to whether the federal government has the right to exercise any particular authority, recourse must be had to the Constitution itself to determine whether such authority is found therein either by express words[9] or by necessary implication.[10] In construing a law of the United States, it is necessary to look to the Federal Constitution to see if the power is granted; but in construing the law of a state, it is necessary to determine whether the legislature is prohibited, by express words or by implication either in the Federal or State Constitutions, from enacting such a law.[11]

Footnotes

1 U.S. Const. Art. I, § 8.

2 New York v. U.S., 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992); Bute v. People of State of Ill., 333 U.S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948).
The Constitution is a charter for a federal government of limited powers. U.S. v. Delpit, 94 F.3d 1134 (8th Cir. 1996).

3 New York v. U.S., 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).
The Constitution limits the government to those powers specifically granted or those that are necessary and proper to carry out those that are specifically granted. Afroyim v. Rusk, 387 U.S. 253, 87 S. Ct. 1660, 18 L. Ed. 2d 757 (1967).

4 Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982); Connor B. ex rel. Vigurs v. Patrick, 774 F.3d 45 (1st Cir. 2014).

5 Case v. Bowles, 327 U.S. 92, 66 S. Ct. 438, 90 L. Ed. 552 (1946).

6 Vullo v. Office of Comptroller of Currency, 378 F. Supp. 3d 271 (S.D. N.Y. 2019).

7 Bond v. U.S., 564 U.S. 211, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011).

8 Shelby County, Ala. v. Holder, 570 U.S. 529, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013).

9 Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co., 149 Neb. 507, 31 N.W.2d 477 (1948), aff'd, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).
The powers granted by the Constitution to the federal government are subtracted from the totality of sovereignty originally in the states and the people, and therefore, when

objection is made that the exercise of the federal power infringes upon rights reserved by the Ninth and 10th Amendments, the inquiry must be directed toward the granted power under which the action of the federal government was taken, and if the granted power is found, the objection of an invasion of Ninth and 10th Amendment rights must fail. United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947).

[10] Robb v. City of Tacoma, 175 Wash. 580, 28 P.2d 327, 91 A.L.R. 1010 (1933).

[11] Los Angeles Met. Trans. Auth. v. Public Util. Com'n, 59 Cal. 2d 863, 31 Cal. Rptr. 463, 382 P.2d 583 (1963); Lincoln Federal Labor Union No. 19129 v. Northwestern Iron & Metal Co., 149 Neb. 507, 31 N.W.2d 477 (1948), aff'd, 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, 6 A.L.R.2d 473 (1949).

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VI. Distribution of Powers of Federal and State Governments

A. Division of Powers

1. Constitutional Powers

§ 214. Federalism and powers reserved to states

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 637, 638

West's Key Number Digest, States 1, 4, 4.4(1) to 4.4(3), 4.16(2)

A.L.R. Library

Construction and Application of 10th Amendment by United States Supreme Court, 66 A.L.R. Fed. 2d 159

The 10th Amendment to the Federal Constitution specifies that the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.[1] The principles of federalism recognize that the states and the federal government exist as dual sovereigns, constraining the federal government from exerting federal power in areas that the

Constitution reserves to the states.[2] Federalism, central to the constitutional design, adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect.[3] The Tenth Amendment confirms the idea that the power of the federal government is subject to limits that may, in a given instance, reserve power to the states.[4] The Tenth Amendment helps police the vertical separation of powers between federal and state governments.[5] However, states cannot exercise powers which exclusively spring out of the existence of the national government which the Constitution does not delegate to them, and no state can say that it has reserved under the 10th Amendment what it never possessed. Thus, the power to add qualifications or term limits for the federal offices of representatives and senator is not a part of the original powers of sovereignty which the 10th Amendment reserved to the states and may not be exercised by them.[6]

In the dual form of government in the United States, each state has the right to order its own affairs and govern its own people except so far as the Constitution expressly or by fair implication has withdrawn that power.[7] In fact, the United States Supreme Court has said that the essence of federalism is that the states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold.[8] It is characteristic of the federal system that states retain autonomy to establish their own governmental processes.[9] In other words, states retain a significant measure of sovereign authority;[10] but they do so only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the federal government.[11]

As compared with the federal government, the state governments are recognized as governments of unenumerated powers, and state power is regarded as reserved power rather than granted or delegated power.[12] The federal balance is not just an end in itself; rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.[13]

Observation:

While the Tenth Amendment's anticommandeering principle prohibits Congress from regulating the states, Congress's constitutional powers, notably under the Spending Clause, do allow Congress to fix the terms on which it will disburse federal money to the states, and by setting such terms, Congress can influence a state's policy choices, and even implement federal policy it could not impose directly under its enumerated powers.[14]

Footnotes

1 U.S. Const. Amend. X.

[2] Sossamon v. Texas, 563 U.S. 277, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011); U.S. v. Walker, 490 F.3d 1282 (11th Cir. 2007).

[3] City of South Miami v. Desantis, 408 F. Supp. 3d 1266, 104 Fed. R. Serv. 3d 1428 (S.D. Fla. 2019); State ex rel. Yost v. Volkswagen Aktiengesellschaft, 2019-Ohio-5084, 137 N.E.3d 1267 (Ohio Ct. App. 10th Dist. Franklin County 2019).

[4] Burban v. City of Neptune Beach, Florida, 920 F.3d 1274 (11th Cir. 2019).

[5] Vullo v. Office of Comptroller of Currency, 378 F. Supp. 3d 271 (S.D. N.Y. 2019).

[6] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).

[7] Cook v. City of Delta, 100 Colo. 7, 64 P.2d 1257 (1937); Home Owners' Loan Corp. v. Arians, 21 N.J. Misc. 339, 34 A.2d 228 (Dist. Ct. 1943); Kelly v. State, 139 Tex. Crim. 156, 138 S.W.2d 1075 (1940).

[8] Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).
Federalism dictates that the states may develop a variety of solutions to problems with varying standards and procedures, provided that they meet the constitutional minimum. State v. Carpenter, 197 Wis. 2d 252, 541 N.W.2d 105 (1995).

[9] Arizona State Legislature v. Arizona Independent Redistricting Com'n, 135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015).
Outside the strictures of the Supremacy Clause, States retain broad autonomy in structuring their governments and pursuing legislative objectives. Shelby County, Ala. v. Holder, 570 U.S. 529, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013).

[10] Gamble v. United States, 139 S. Ct. 1960, 204 L. Ed. 2d 322 (2019); Arizona State Legislature v. Arizona Independent Redistricting Com'n, 135 S. Ct. 2652, 192 L. Ed. 2d 704 (2015); Tafflin v. Levitt, 493 U.S. 455, 110 S. Ct. 792, 107 L. Ed. 2d 887 (1990).
The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other. U.S. v. Windsor, 570 U.S. 744, 133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013).
States are not subdivisions of the federal government as public school districts are subdivisions of state governments; rather, states are quasi-sovereigns and are owed by the federal government as well as by each other the mutual respect of sovereigns or what is called "comity." E.E.O.C. v. State of Ill., 69 F.3d 167, 104 Ed. Law Rep. 578 (7th Cir. 1995).

[11] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995).

[12] Angell v. City of Toledo, 153 Ohio St. 179, 41 Ohio Op. 217, 91 N.E.2d 250 (1950); City of Cleveland v. Piskura, 145 Ohio St. 144, 30 Ohio Op. 340, 60 N.E.2d 919 (1945).

[13] Shelby County, Ala. v. Holder, 570 U.S. 529, 133 S. Ct. 2612, 186 L. Ed. 2d 651 (2013).

[14] State v. Department of Justice, 951 F.3d 84 (2d Cir. 2020).

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VI. Distribution of Powers of Federal and State Governments

A. Division of Powers

1. Constitutional Powers

§ 215. Simultaneous supremacy of state and federal governments

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 637, 638

West's Key Number Digest, States 4, 4.1(1), 4.16(1)

Although the federal government and the states exist within the same territorial limits, each form of government, whether federal or state, is simultaneously supreme within its sphere, the former as to all powers granted, expressly or impliedly, under the Federal Constitution and the state as to all other powers.[1] There can be no loss of separate and independent autonomy to the states through their union under the Constitution since the preservation of the states and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution in all its provisions looks to an indestructible union composed of indestructible states. The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the Federal Constitution.[2]

Where Congress exceeds its authority relative to the states, a departure from the constitutional plan

cannot be ratified by the "consent" of state officials as the Constitution does not protect the sovereignty of the states for the benefit of the states or state governments as abstract political entities or even for the benefit of public officials governing the states, but rather, the Constitution divides authority between the federal and state governments for the protection of individuals. Therefore, the constitutional authority of Congress cannot be expanded by the "consent" of a state governmental unit whose domain is thereby narrowed.[3]

Footnotes

1 Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936); United States v. Sprague, 282 U.S. 716, 51 S. Ct. 220, 75 L. Ed. 640, 71 A.L.R. 1381 (1931).

2 Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

3 New York v. U.S., 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992).

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VI. Distribution of Powers of Federal and State Governments

A. Division of Powers

1. Constitutional Powers

§ 216. Retained powers of the people under Ninth Amendment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 637, 638

West's Key Number Digest, States 4, 4.1(1), 4.16(1)

The Ninth Amendment to the United States Constitution provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.[1] While the Ninth Amendment has sometimes been dismissed by writers as a redundancy adding nothing to the rest of the Constitution, the Supreme Court has said that a careful reading of the words and history of the amendment indicates that it was intended to play a role in our constitutional scheme and ought not to be so lightly dismissed.[2] Based on historical evidence, the Ninth Amendment appears to have been added to the Constitution to preserve, against encroachment by the federal government, individual rights embedded in state law until such rights are modified or abolished by state authorities by a judicial determination of unconstitutionality or by a demonstrated interference with the proper scope of federal authority.[3]

The Ninth Amendment does not withdraw rights expressly granted to the federal government[4] and if a

grant of power to the federal government is found, an objection, based upon the Ninth Amendment, of invasion of the rights must fail.[5]

Footnotes

1 U.S. Const. Amend. IX.

2 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980).

3 U.S. v. Stowe, 100 F.3d 494 (7th Cir. 1996).

4 Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S. Ct. 466, 80 L. Ed. 688 (1936).

5 United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754 (1947).

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